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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. [redacted] 49

In Re COSMOPOLITAN POWER COMPANY, Bankrupt,
THE STATE OF NEW JERSEY, *Appellant,*
vs.
WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

SUGGESTIONS OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL.

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No. 302.

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vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt, *Appellee*.

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SUGGESTIONS OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL.

STATEMENT.

I.

The appeal in this case was taken under section 25, clause 2 of the Bankruptcy Act, which provides *inter alia* that an appeal may be had from any final decision of a court of appeals allowing or rejecting a claim,

> "Where some Justice of the Supreme Court of the United States shall *certify* that *in his opinion* the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

The questions here in controversy relate solely to the construction of that part of section 25 above quoted, as it is not disputed that the decision of the Court of Appeals for the Seventh Circuit in this case complies in other respects with the requirements of section 25.

On May 11, 1905, Mr. Justice Day allowed the appeal of appellant, under the provisions of section 25 above quoted, and certified of record that

> "*In my* (*his*) *opinion* the determination of the questions involved herein is essential to a uniform construction of the bankruptcy act throughout the United States." (Rec., 56½.)*

Opposing counsel, however, takes issue with the learned justice who allowed the appeal and argues in support of the motion to dismiss that this court is without jurisdiction because

> "the question involved is *not essential* to a uniform construction of the bankruptcy act throughout the United States." (Brief, p. 5.)

Section 25 of the Bankruptcy Act unconditionally provides that an appeal may be had where some justice shall certify that "*in his opinion*" (not in the opinion of the whole court) the determination of the questions involved is essential to a uniform construction of the Bankruptcy Act. The manifest purpose of that section is that the appeal should be allowed upon obtaining the requisite certificate "of some justice of the Supreme Court."

The only other conditions are (1) that the judgment of the Court of Appeals must be final, and (2) the decision must be one "allowing or rejecting a claim." Both of these conditions exist in the case at bar, and

*Note. References are to folio pages of record.

the granting of the certificate is therefore conclusive. Congress never intended that the "opinion" of the justice allowing the appeal should be revised or reviewed. The act does not say that an appeal shall be allowed *where the questions involved are essential to a uniform construction of the act.* It says that it shall be allowed "Where some justice * * * *shall certify that in his opinion* the determination of the question * * * is essential to a uniform construction." If Congress had intended to make the granting of an appeal *conditional* upon the *fact* that the determination of the question was *essential to a uniform construction of the act* and not upon *the obtaining of the certificate of opinion* to that effect, it would have so expressed it. The jurisdictional fact is the obtaining of the certificate of opinion. In the present case the learned justice has judicially determined (Rec., 56½) that *in his opinion* the determination of the questions involved is essential to a uniform construction of the act. Will the court revise that judgment and say that such was not the opinion of the learned justice or that such opinion is erroneous? There is nothing in the Bankruptcy Act to justify it.

In *Callan* v. *May,* 2 Black, 541, relied on by appellee (as holding that the allocatur of a single justice allowing an appeal, is not conclusive), an interlocutory order was issued in certain proceedings pending in a Circuit Court, awarding a writ of *habere facias possessionem* against one Callan (the appellant). Callan petitioned for an appeal to this court and the appeal was allowed on special allocatur by Mr. Justice Wayne. A motion was made to dismiss the appeal on the ground that the

order appealed from was not a final order. This court said (p. 543):

> "The order of the court directing process to issue is not such a final order or decree in a case as the act of 1789 contemplates."

It was in this connection that the court held that the order of Mr. Justice Wayne allowing the appeal was not conclusive, and said (p. 543):

> "Writs of error to state courts cannot issue without the allocatur of a judge of this court. Yet there is hardly a term in which a case of that description has not been dismissed upon the ground that the transcript did not show a case in which a writ of error would lie."

And again (p. 544):

> "The allocatur of a single judge certainly cannot enlarge the appellate powers of this court beyond the limits prescribed by law, and that law does not authorize an appeal from an order directing execution to issue to enforce a judgment."

The Act of 1789, under which the above decision was rendered, provides that certain designated classes of cases may be re-examined and reversed or affirmed in this court upon a writ of error. Section 25 of the Act of 1789 is construed in *Twitchell* v. *Commonwealth*, 7 Wall., 321, where this court said (p. 324):

> "But writs of error to state courts have never been allowed as of right. It has always been the practice to submit the record of the state courts *to a judge of this court*, whose duty has been to ascertain upon examination *whether any question, cognizable here upon appeal*, was made and decided in the proper court of the state, and whether the case upon the face of the record will justify the allowance of the writ.
>
> In general, the allowance will be made where the decision *appears* to have involved a question with-

> in our appellate jurisdiction; but refusal to allow the writ is the proper course when no such question appears to have been made or decided; and also where, although a claim of right under the Constitution or laws of the United States may have been made, it is nevertheless clear that the application for the writ is made under manifest misapprehension as to the jurisdiction of this court."

It is not disputed if a justice of this court allows a writ of error or an appeal in a case of which this court has no jurisdiction under the Judiciary Act, that the order of the justice is not conclusive upon the whole court. In *Callan* v. *May* the appeal was dismissed because the order appealed from was not final. It is clear that the allocatur of the justice in that case could not operate to confer upon the court jurisdiction of a matter without its jurisdiction. In the present case the certificate of Mr. Justice Day *did* confer jurisdiction of the cause when he certified that *in his opinion*

> "the determination of the questions involved herein *is essential* to a uniform construction of the Bankruptcy Act."

The certificate of the justice in the present case is *jurisdictional*, and operated to confer jurisdiction upon this court under the express terms of Section 25 of the Bankruptcy Law, which provides that

> "an appeal may be had * * * where some justice shall certify that *in his opinion* the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction"

of the Bankruptcy Act, etc.

A reading of *Callan* v. *May* demonstrates its inapplicability. Thus it is stated that an *allocatur* of a single

justice is not binding upon the whole court for the reason that to so hold

> "would throw upon a single judge the responsibility which properly belongs to the court."

This reasoning does not apply here, because Section 25 *does* throw the responsibility upon a single justice, by providing for the allowance of an appeal upon a certificate by such justice that "in *his* opinion," etc. Again it is said in the Callan case:

> "It does not by any means follow that the judge who authorizes the appeal has made up his own mind that the party is legally entitled to it."

This reasoning clearly differentiates the case from the one at bar for here the fact that the justice must certify "*his* opinion" certainly presupposes that the justice has made up his mind.

And in the concluding sentence of the opinion the court said:

> "The *allocatur* of a single judge certainly can not enlarge the appellate powers of this court beyond the limits prescribed by law, *and that law does not authorize an appeal* from an order directing execution to issue to enforce a judgment" (*i. e.*, the order was not of a final nature).

In the present case the certificate of the justice *confers the jurisdiction.* In *Callan* v. *May* the order could not have that effect, for the reason that the appeal was not one authorized by law and of course the order could not confer jurisdiction over an unauthorized appeal. In that case the granting of the *allocatur* was purely a matter of procedure; here it is jurisdictional.

II.

THE DETERMINATION OF THE QUESTIONS INVOLVED IS ESSENTIAL TO A UNIFORM CONSTRUCTION OF THE BANKRUPTCY ACT.

But, even if it were to be conceded that the certificate of Mr. Justice Day is not conclusive upon this court, the record amply demonstrates that the determination of the questions here involved is essential to a uniform construction of the Bankruptcy Act. Although this is not the occasion to discuss the merits of the case, it is necessary to briefly refer to the facts and to a few of the decisions upon the questions of law arising on this record, in order to show the logic of the opinion of Mr. Justice Day that the determination of the questions here involved *is* essential to a uniform construction of the Act.

The Cosmopolitan Power Company (the bankrupt) is a corporation organized under the laws of the State of New Jersey on April 30, 1900. Its capital stock on January 1, 1902, was $40,000,000, of which $10,000,000 was issued and outstanding. On May 13, 1902, its capital stock was reduced to $2,500,000. No franchise taxes have been paid to the State of New Jersey for the years 1902 and 1903. A petition in bankruptcy was filed against the Cosmopolitan Power Company on April 23, 1903, and the company was thereafter duly adjudicated a bankrupt. On November 7, 1902, the State Board of Assessors of New Jersey upon the failure of the Cosmopolitan Company to make a return, levied an assessment for a license tax against the com-

pany, for the year 1902, of $5,750. (Rec., 17.) On June 1, 1903, there was assessed against the company for the year beginning January 1, 1903, a similar tax of $2,500 (Rec., 30), in accordance with the return of the company, which return was filed on May 2, 1903. (Rec., 27-29.)

On February 12, 1904, a motion was made for an order on the trustee to pay the claim as a preferred claim in advance of the payment of dividends to the creditors of said estate. (Rec., 27.)

Objections were filed to the claim by the trustee (Rec., 2) on the ground that the claim was not entitled to priority; also that it was not properly provable against the estate. The referee allowed the claim as a general claim for the sum of $4,943.08. (Rec., 10.)

The referee in denying the claim held (Rec., 9) that the kind of tax contemplated by the Bankruptcy Act is one that is a lien on the property out of which the collection is made. The referee also held (Rec., 8) that a franchise tax was not a tax but a mere contract obligation. Thereafter appellant filed its petition for review (Rec., 12), and on September 12, 1904, the District Court affirmed the order of the referee without an opinion (Rec., 32).

An appeal was prosecuted to the United States Circuit Court of Appeals for the Seventh Circuit. That court allowed the claim of $2,500 for the 1903 taxes as a general claim, but in other respects affirmed the judgment of the District Court and denied priority to any part of the claim of appellant. (Rec., 48-54; 137 Fed., 862.)

The claim of the State of New Jersey was made up of the following items (Rec., 16):

Tax 1902	$5,750.00
Interest to October 15, 1903	891.25
Costs on injunction proceedings, because of non-payment of taxes	26.15
Tax 1903	2,500.00
Interest to October 15, 1903	87.50
	$9,254.90

The taxes in question were assessed under the Act of April 18, 1884 (Laws of New Jersey of 1884, Chap. 159), as amended. The Act is entitled "An Act to provide for the imposition of *state taxes* upon certain corporations and for the collection thereof." Section 1 provides that

> "All corporations * * * shall pay an annual license fee or franchise tax of one-tenth of one per centum on all amounts of capital stock *issued and outstanding* up to and including the sum of $3,000,000."

The same section further provides for the making of a return on or before the first Tuesday of May in each year of the amount of stock outstanding on the preceding January first.

Section 2 provides that on failure of the corporation to make a return, the State Board of Assessors, shall fix the "annual license fee or franchise tax" and the amount so fixed "*shall stand as the basis of taxation*" under the act.

Section 3 provides that the State Board of Assessors shall report to the Comptroller on or before the first Monday of June in each year, a statement of the basis of "the annual license fee or franchise tax" and the

"amount of tax" due, which tax shall thereupon be due and payable, and that if the tax remains unpaid on July 1st, interest shall be charged.

Section 4 provides:

> "Such tax, when determined shall be a debt due from such company to the state, for which an action at law may be maintained after the same shall have been in arrears for the period of one month; *such tax shall also be a preferred debt in case of insolvency.*"

Section 5 provides that in addition to other remedies for the collection of such tax, it shall be lawful whenever any tax shall remain in arrears for three months, to apply for an injunction to restrain the corporation from the exercise of any franchise or the transaction of any business until the payment of such tax.

Section 6 provides that if any corporation shall for two consecutive years fail to pay any tax which shall be assessed against it, the charter shall be void unless further time is given for the payment of such taxes.

Section 7 provides for making a list of delinquent corporations which fail to pay taxes.

Section 10 provides for the appointment of a receiver to enforce the collection of taxes.

It is under this act that the taxes upon which the claim of the appellant is based, were levied. Wherever the charge is spoken of in the statute it is referred to as a tax. In numerous decisions under this act, the nature of this tax has been discussed and its character as a tax has been established.

It was contended in the Circuit Court of Appeals

that the franchise tax imposed by the State of New Jersey was a tax within the meaning of Section 64, Subd. A, of the Bankruptcy Act, and that inasmuch as the highest court of New Jersey in *Hancock, Comptroller,* v. *Singer Mfg. Co.,* 62 N. J. L., 289 (decided Nov. 14, 1898), had squarely so decided, the Federal Court was bound thereby. The question in that case was whether the levying of a franchise tax upon the capital stock of a corporation was a violation of a tax exemption clause in the company's charter. The court there said:

> "The Act of 1884 (Pamph. L, p. 232) is entitled 'An Act to provide for the imposition of state taxes upon certain corporations and for the collection thereof.'
>
> 'In this act this imposition is called a yearly license fee or tax.'
>
> In a supplement passed to the Act of 1884 (Pamph. L, 1891, p. 150), it is styled 'a tax.'
>
> In a further supplement passed in 1892 (Pamph. L, p. 136) it is called 'an annual license fee or franchise tax.'
>
> It is wholly immaterial what name may be given to it. The fact that it is called a 'license fee' or 'franchise tax' cannot validate it. It is levied under an act passed 'to authorize the imposition of state taxes,' and it is none the less an interdicted imposition, and *none the less a tax because it is given a new name.*"

And so it was also held in the following cases in the courts of New Jersey, to which it is not necessary to further refer at the present time:

State v. *Evening Journal Ass'n,* 47 N. J. L., 36;

State Board of Assessors v. *Central R. R. Co.,* 48 N. J. L., 146;

Standard Cable Co. v. *Attorney General*, 46 N. J. Eq., 270;
Pipe Line Co. v. *Berry*, 52 N. J. L., 308, 311;
Trenton Savings Fund v. *Richards*, 52 N. J. L., 156;
Honduras Commercial Co. v. *State Board of Assessors*, 54 N. J. L., 278;
Lumberville Bridge Co. v. *Assessors*, 55 N. J. L., 529;
State v. *Board of Assessors*, 61 N. J. L., 461;
Myers v. *Campbell*, 64 N. J. L., 186;
Ches. & O. Ry. Co. v. *Atlantic Transp. Co.*, 62 N. J. Eq., 751;
Mayor, etc., of Newark, v. *State Board*, 67 N. J. L., 246;
Arimex Cons. Copper Co. v. *State Board*, 69 N. J. L., 121;
Hardin v. *Morgan*, 70 N. J. L., 484.

The Circuit Court of Appeals held in effect (Rec., 52) that the decisions of the New Jersey courts holding the imposition was a tax, were not binding on it and that the court could determine the question irrespective thereof. Referring to the Singer case the Circuit Court of Appeals said,

> "we do not believe that the United States bankruptcy courts are bound to follow it blindly,"

though in the following cases it was held that the bankruptcy courts should follow state decisions upon the question as to whether or not a particular imposition was a tax:

In Matter of Emmerman v. *Ohio Steel & Iron Co.*, 13 Am. Bank R., 40 (Dist. Ct. N. Dist. of Ohio E. D.);

In re Ott, 2 Am. B. R., 637, 647 (Dist. Ct. So. Dist. of Iowa); s. c., 95 Fed., 274;

Matter of Mutual Merc. Agency, 8 Am. B. R., 435 (Dist. Ct. So. Dist. of N. Y.);

In re Danville Rolling Mill Co., 10 Am. B. R., 327 (Dist. Ct. E. Dist. of Pa.); s. c., 121 Fed., 432.

In the case of *Mutual Mercantile Agency*, 8 Am. Bank. Rep., p. 435, decided by the District Court of the Southern District of New York (September 3, 1902), it was held that a franchise tax levied by the State of New Jersey under the same Act of April 18, 1884 was a tax within the meaning of Section 64a of the Bankruptcy Law *and entitled to priority*. It was there said:

> "This case (*Hancock, Comptroller*, v. *Singer Mfg. Co., supra*) is controlling. To hold otherwise would be to deny the State of New Jersey a priority under the above mentioned section, as all of the revenue of the state is raised by franchise tax except a small school tax.
>
> *There is nothing in the Bankruptcy Act to suggest an intention of Congress in the use of the word 'tax' to limit the meaning to any particular kind of tax.*
>
> Therefore an order may be entered allowing the aforesaid claim of the State of New Jersey as a priority claim and directing the trustee to pay the same."

The holding of the Singer case would seem conclusive that the franchise tax here in controversy is a tax, but it is unnecessary at this time to review that case at length.

The same conclusion was reached in *1st Nat. Bank* v. *Aultman, Miller & Co.* (decided June 13, 1904), 12

Am. Bank. Rep., p. 12 (Northern District of Ohio). The referee there held that a franchise tax levied by the State of Ohio upon the capital stock of one of its corporations, was a provable claim in bankruptcy and entitled to priority.

A similar conclusion was reached by Referee Doyle in *Matter of Emmerman* v. *Ohio Steel & Iron Co.* (Dist. Court N. Dist. of Ohio E. D.), 13 Am. B. R., p. 40, decided June, 1904, which decision was affirmed by Judge Wing on January 9, 1905.

The opposite conclusion was reached upon precisely the same state of facts in *In re Danville Rolling Mill Co.*, 121 Fed., 432, s. c., 10 Am. B. R., 327, decided by Judge McPherson, of the Eastern District of Pennsylvania, April 3, 1903. That case without any reference to *Hancock, Comptroller*, v. *Singer Mfg. Co.*, relied on the supposed authority of *In re United States Car Co.*, 60 N. J. Eq., 514, decided July 7, 1899, less than eight months later than the Singer case was decided. The facts in that case were as follows: The State of New Jersey assessed a state tax against the car company, under the Act of 1884, subsequent to the entry of a decree of insolvency and the appointment of receivers. The receivers did not have sufficient assets to pay the debts of the company; nor was the business of the company continued in any way, nor its franchises exercised, after the appointment of the receivers.

As we contended in the Circuit Court of Appeals, it was not necessary for the court in the Car Company case to decide whether or not the imposition in question was or was not a tax, as the only issue was whether

the charge was payable if it was imposed after the appointment of a receiver. The New Jersey court decided that payment must be made, because of the provision of the New Jersey Act (Section 6) that

> "such tax shall be a *preferred* debt in case of insolvency."

When this case is heard on its merits we think that it will be readily shown that there is no conflict between the Singer case (62 N. J. L., 289) and the Car Company case (60 N. J. E., 514). It is not disputed that the Singer case holds the franchise tax *is a tax*. It is contended that the Car Company case holds the contrary. A reading of that case indicates that the language relied on is mere *dicta*. The fact that the Car Company case was decided less than eight months after the decision in the Singer case, and without any reference to it, proves that it was not meant to overrule the Singer case, and the fact that of the *nine* judges who decided the Car Company case *seven* concurred in the two opinions in the Singer case (58 N. J. L., 633, and 62 N. J. L., 289), makes this contention still more conclusive. The Circuit Court of Appeals, however, held that it was not bound to follow the decision in the Singer case. (Rec., 52, 53.)

But even if the New Jersey cases were to be disregarded the decisions of this court should be binding.

In *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S., 530, this court, in speaking of a charge of this character, said:

> "But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation."

And in *Massachusetts* v. *W. U. Tel. Co.*, 141 U. S., 40, 45:

> "By whatever name the tax may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation; and those laws attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein."

And to the same effect are:

Wilmington R. R. Co. v. *Reid*, 13 Wall., 264;

A. & P. Tel. Co. v. *Philadelphia*, 190 U. S., 160;

W. U. Tel. Co. v. *Missouri*, 190 U. S., 412;

I. C. R. R. Co. v. *Decatur*, 147 U. S., 190.

It is contended by appellee that there is absolute uniformity of decision in the holdings of the various courts in deciding the questions here in controversy. Let us see!

Section 64, subdivision A of the Bankruptcy Act, provides:

> "The court shall order the trustee to pay *all taxes* legally due and owing by the bankrupt to the United States, *state*, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of such tax the same shall be heard and determined by the court."

In the matter of the *Mutual Mercantile Agency*, *supra*, Referee Allen, on the authority of *Hancock* v.

Singer Mfg. Co., 62 N. J. L., 289, sustained the preferential character of the franchise tax of New Jersey here in controversy and construed Section 64, Subdivision A, *supra*, and said:

> "Following the principle of the Ott case that the construction given by the state court to the state exemption laws should be followed by the Federal Courts, we must consult the law * * * of the State of New Jersey in deciding the case under discussion."

And the referee further held:

> "In the case of *Hancock, Comptroller*, v. *Singer Mfg. Co.*, reported in 62 N. J. L., 289, the highest court of the State of New Jersey *has in no uncertain way* decided that the franchise tax was a tax,"

and the referee following the decisions of this court in

> *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S., 530, 547, and
>
> *Ill. Cent. R. R. Co.* v. *Decatur*, 147 U. S., 190-199,

said:

> "Such exactions have always been held to be taxes *by whatever name they happen to be called.*"

And the referee concluded:

> "There is nothing in the Bankruptcy Act to suggest an intention of Congress, in the use of the word 'tax,' *to limit the meaning to any particular kind of tax.*"

The opinion of Referee Allen was affirmed by the District Court. (Rec., 5.)

Yet in the present case the Circuit Court of Appeals when *Hancock* v. *Singer Mfg. Co.* was pressed upon its attention as a controlling authority, said:

> "But if we are mistaken, and if the Singer Co.

> case is to be accepted as an authoritative decision that the charge in question is a tax, *we do not believe that the United States Bankruptcy Courts are bound to follow it blindly.* THE QUESTION WITH THEM IS THE INTERPRETATION AND APPLICATION of Section 64a. If the legislature of a state gives the name tax to an exaction which is not a tax, and if the courts of a state join in the misnomer, surely the bankruptcy courts are not required to disregard the substance of the thing, to the detriment of other claimants. The state courts may authoritatively expound the substance and the Federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And moreover, the latter part of Section 64a seems to direct the bankruptcy courts so determine independently the 'legality of any such tax.'"

We thus have a clear and irreconcilable conflict between two courts on at least one question which relates to the construction of the act, viz., whether the bankruptcy courts are bound to follow the highest court of the state, as held in the Mutual Mercantile Agency case, *supra*, and other cases, *infra*, or whether such courts can decide the question without reference to state decisions, as held by the Circuit Court of Appeals in the present case.

And *In re Ott*, 2 A. B. R., 637 (Dist. Ct. So. Dist. of Ia., East Div.), s. c., 95 Fed., 274, Judge Woolson, in a lengthy opinion, holds that the decisions of the highest courts of the state, as to whether or not a particular charge is a tax, are binding on the Federal courts sitting in bankruptcy, saying:

> "I am convinced that this court must follow the state court on this matter."

And in the matter of *Emmerman* v. *Ohio Steel &*

Iron Co., 13 Am. B. R., 40 (Dist. Ct. No. Dist. of Ohio, E. D.), Referee Doyle said:

> "In determining what is a tax in the respective states, the bankruptcy courts look to the laws and decisions of such states."

Again, the Circuit Court of Appeals, in construing the nature of the present franchise tax, holds that it is neither a capitation tax nor an occupation tax, nor a property tax. And says (Rec., 53):

> "A state may grant franchises and then tax them as property, just as it may grant or lease land and then tax the granted estate as property. But the tax upon the estate is not to be confused with the consideration for the grant. If one pays a lump sum or annual sums as the consideration for the grant, *he does so by virtue of a contract.* * * * *Holding it to be a liability under a contract*, we find no error in the courts looking to the contract for the measure of the liability."

Yet in *In re Danville Rolling Mill Co.*, 121 Fed., 432, s. c., 10 Am. B. R., 327 (Dist Ct. of Penn., East Div.), when the argument was made that this very franchise tax was provable as a "contractual obligation," Judge McPherson replied:

> "This argument is ingenious, but I do not regard it as sound. * * * Certainly, the ordinary meaning of the phrase, 'a contract, express or implied,' does not include the public duties that a corporate creature owes to its sovereign creator. If it includes the duty to pay lawful annual charges, it also includes the duty to obey all other laws; and since 'debt,' in the Bankruptcy Act, means 'any debt, demand or claim provable in bankruptcy,' it would follow logically that any money claim of the state against a corporation, arising out of a violation of law, would be also provable. It seems to me impossible to stretch the language of this

clause so far as to include the subject now under consideration."

There is here, then, without any reference to state decisions, another clear and irreconcilable conflict between two courts as to the nature of the tax.

And in this connection it may not be out of place to call attention to the holding of the referee in the present case when he stated (Rec., 9):

> "It seems to me that the kind of tax contemplated by the bankruptcy statute is one that *is a lien on the property* out of which the collection is to be made."

In marked contrast to this holding is the decision in the Mutual Mercantile Agency case, *supra*, wherein it is stated that:

> "There is nothing in the Bankruptcy Act to suggest an intention of Congress in the use of the word 'tax,' to limit the meaning to any particular kind of tax."

To reconcile all of the cases with reference to the scope of Section 64a, or the nature of franchise taxes in general would be a manifest impossibility.

There is also another important question relating to the construction of Section 64a the decision of which is necessary to the disposition of this case. The last clause of that section provides:

> "In case any question arises as to the amount or *legality* of any such tax, the same shall be heard and determined by the court."

Appellant's claim for the 1902 taxes was for $5,750. The referee under the authority of that portion of Section 64a above quoted, *revised* the assessment of the board of assessors of New Jersey, and allowed the claim for $4,250. In 1902 the

corporation failed to make a return and the board of assessors under the provisions of the act (Sec. 2) fixed the tax at $5,750 on the amount of the *authorized* capital stock ($40,000,000). As a matter of fact, but $10,000,000 of the stock was issued and outstanding, and if the corporation had made a return the tax would have been but $4,250.

The act provides (Sec. 2) that on failure of the corporation to make a return as required by section one of the act the State Board of Assessors shall fix "the annual license fee or franchise tax" and

> "The amount so fixed by them (assessors) shall stand as such basis of taxation under the act."

It is clear that the fact that the assessors based their assessment on the *authorized* capital stock instead of upon the *issued* capital stock, is chargeable solely to the failure of the corporation to make a report, as required by law. In the absence of such a report, the board of assessors made their assessment according to law. The authorities are unanimous that in this collateral proceeding the assessment in question cannot be assailed. It is binding on all the world unless impeached in a direct proceeding. The statutes expressly provide a means for the adjustment of unjust taxes (Laws of New Jersey of 1897, p. 178; also Dill's Corporation Laws of N. J., Ed. of 1903, p. 161).

Yet the court affirmed the action of the referee (Rec., 53, 54) and held that as the liability was one under a contract there was no error in the courts looking to the contract for the measure of the liability. The Circuit Court of Appeals says (Rec., 53):

> "This contention would require consideration, if the charge were a tax. Holding it to be a lia-

> bility *under a contract*, we find no error in the courts looking to the contract for the measure of the liability."

Although, as stated, we have not attempted to here argue the merits of the case, we wish to suggest that to range the present franchise tax in the class of contract liabilities would be to deny to the New Jersey legislature the power to increase or decrease this annual franchise tax. We do not believe a court would deny to the sovereign State of New Jersey any such power.

The Circuit Court of Appeals says (Rec., 52):

> "Moreover the latter part of Sec. 64a seems to direct the bankruptcy courts to determine independently the 'legality of any such tax.'"

It was attempted there to justify the action of the referee in revising the 1902 tax by reference to the provision of Section 64a above quoted.

It was argued by the appellant in the Circuit Court of Appeals that Sec. 64a did not justify the action of the referee, and that the assessment in question was not subject to collateral attack. We will not now discuss the merits of that question, except to state that it is one of the questions which needs to be decided by this court. It is not unusual for a corporation in a failing condition to neglect to make a return to the taxing authorities as to its outstanding capital stock, preceding the bankruptcy proceedings, as was done by the corporation in the present case. The question here presented is likely to frequently arise and the determination of the question by this court is essential to a uniform construction of the Act, especially in view of the holding of the Circuit Court of Appeals that the referee

can review the assessment, which is without support in the authorities. Even if it were conceded that the tax was *erroneously* assessed, this would be far from involving the "*legality*" of the tax.

In conclusion we submit that the motion to dismiss the appeal should be denied. We believe that it was the clear and expressed intention of Congress to make the granting of the certificate of opinion by a justice of this court final, and the issuing of the certificate in the present case is therefore jurisdictional, and not a mere matter of procedure. If our contention is not correct we believe that the record amply justifies the action of the learned justice in allowing the appeal. There exist in many of the states laws similar to the present franchise tax law of New Jersey. Many corporations have been adjudicated bankrupt under the present law and in many of the cases (and there are several pending in the District Court for the Northern District of Illinois) the question is, and has been, presented as to the right of a state to priority in the payment of accrued and accruing franchise taxes. It is therefore of great importance that uniformity should prevail, and that the proper rule of law should be finally and permanently established by this tribunal. We respectfully submit that the motion to dismiss the appeal should be denied.

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